Eighteenth Annual Willem C. Vis (East) International Commercial Arbitration Moot

ALBERT LUDWIG UNIVERSITY OF FREIBURG

Memorandum for CLAIMANT

On Behalf Of

RespiVac plc
Rue Whittle 9
Capital City, Mediterraneo
– CLAIMANT –

Against

CamVir Ltd
112 Rue L. Pasteur
Oceanside, Equatoriana
and
VectorVir Ltd
67 Wallace Rowe Drive
Oceanside, Equatoriana
– RESPONDENTS –

TOM AUST • THERESIA DE LA CRUZ ROTHENFUSSER • PETER HORSTKOTTE
ESTELLE PFLÜGER • RORY PRICE • TOSCA SCHWEHN • FRANKA STÜCK • CHRISTIAN WILD

Freiburg, Germany

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%	percent
AC	Advisory Council
Art.	Article
BGB	Bürgerliches Gesetzbuch (German Civil Code)
cf.	confer
CISG	United Nations Convention on Contracts for the International Sale of Goods
ed.	editor/edition
et al.	et alii (and others)
et seq.	et sequens (and the following)
etc.	et cetera
EUR	Euro, €
FS	Festschrift
HGB	Handelsgesetzbuch (German Commercial Code)
IBA	International Bar Association
Inc	Incorporation
LLC	Limited Liability Company
Ltd	Limited
Mr.	Mister
Ms.	Miss
No.	Number
Op.	Opinion
p./pp.	page/pages
plc	Private Limited Company

para.	paragraph
PO	Procedural Order
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
v	versus
Vol.	Volume
vol. ed.	Volume editor

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AAA Rules	American Arbitration Association Commercial Arbitration Rules and Mediation Procedures, 1 October 2013
CISG	United Nations Convention on Contracts for the International Sale of Goods, 11 April 1980
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration, 29 May 2010
ICC Rules	International Chamber of Commerce Arbitration Rules, 1 March 2017
Swiss Rules	Swiss Rules of International Arbitration, 1 June 2012
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006
UNCITRAL Rules	UNCITRAL Arbitration Rules, 2013
UNIDROIT Principles	UNIDROIT Principles on International Commercial Contracts 2016

STATEMENT OF FACTS

The parties to this arbitration are RespiVac plc [hereafter: CLAIMANT], CamVir Ltd [hereafter: RESPONDENT NO. 1] and VectorVir Ltd [hereafter: RESPONDENT NO. 2].

CLAIMANT is a start-up biopharmaceutical company based in Mediterraneo, currently engaged in the development of a vaccine against COVID-19.

RESPONDENT NO. 1 is a contract manufacturing organization based in Equatoriana, which specializes in the production of pharmaceutical base materials for various vaccines and drugs.

RESPONDENT NO. 2 is a start-up based in Equatoriana, which researches the use of viral vectors for the development of vaccines. It is the patent holder for GorAdCam vectors.

RESPONDENT NO. 1 and RESPONDENT NO. 2 [hereafter: RESPONDENTS] are both 100 % subsidiaries of Roctis AG [hereafter: Roctis], the holding company of the Roctis Group, which is one of the biggest pharmaceutical companies in the world.

In 2019, CLAIMANT and RESPONDENT NO. 1 [hereafter: the Parties] entered into a Purchase, Collaboration and License Agreement [hereafter: PCLA]. It concerns the acquisition of GorAdCam vectors by CLAIMANT and a non-exclusive license grant by RESPONDENT NO. 1, which is necessary for a proper use of the vectors, as well as further purchase obligations.

15 Jun 2014 Ross Pharmaceuticals [hereafter: Ross] and RESPONDENT NO. 2 enter into an agreement [hereafter: Ross Agreement] regarding the use of GorAdCam vectors for research [*Notice, p. 5, para. 8*]. RESPONDENT NO. 2 issues a press statement about the Ross Agreement [*Exhibit C1, p. 9*].

Aug 2018 Roctis acquires RESPONDENT NO. 2 and its patents [*Notice p. 5, para. 10*]. Therefore, RESPONDENT NO. 2 grants RESPONDENT NO. 1 an exclusive license for the production, sale and sublicensing of the GorAdCam vectors for all applications with the exception of malaria [*Notice, p. 6, para. 10*].

6 Dec 2018 Ms. Bordet (Head of Contract, Ross) emails Mr. Doherty (at this time the Director Legal, RESPONDENT NO. 2) stating that Ross sees itself entitled by the Ross Agreement to research vaccines against infectious respiratory diseases using the GorAdCam vectors [*Exhibit R4, p. 35*].

Dec 2018 Mr. Doherty takes over the negotiations between RESPONDENT NO. 1 and CLAIMANT concerning the PCLA, providing his template for the contract [*Exhibit R2, p. 31, para. 8*].

1 Jan 2019 Mr. Doherty becomes RESPONDENT NO. 1's new head of contract [*Exhibit R2, p. 30, para. 1*].

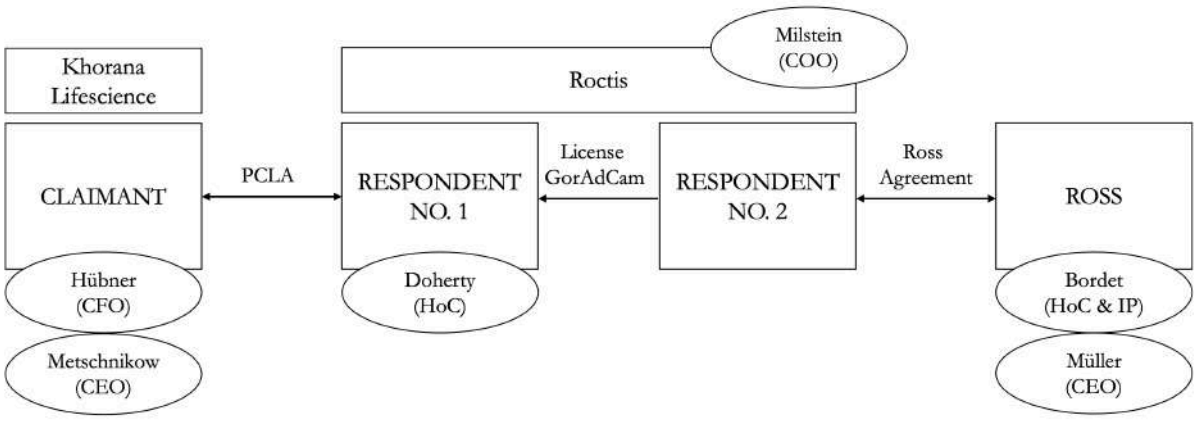
The PCLA becomes effective [*Exhibit C3, p. 11*].

19 Dec 2019 An article in the journal Biopharma Science reports that Ross understands the license it was granted by RESPONDENT NO. 2 extends to "infectious respiratory diseases including that caused by COVID-19" [*Exhibit C4, p. 18*].

End of 2019 Ross begins its research on vaccines against several infectious respiratory diseases, including that caused by MERS-coronavirus, using the GorAdCam vectors [*Answer, p. 27, para. 15*].

Feb 2020 CLAIMANT, having focused its research on a vaccine against COVID–19, concludes a Phase II clinical trial with promising results [*Notice, p. 7, para. 18*].

2 May 2020 Mr. Metschnikow (COO, CLAIMANT) is informed of the ongoing dispute between Ross and Roctis. He immediately e-mails Ms. Flemming (CEO, RESPONDENT NO. 1) [*Exhibit C5, p. 19*].



INTRODUCTION

"An ounce of prevention is worth a pound of cure."

Benjamin Franklin

While the concept of vaccination was largely unknown in Benjamin Franklin's time, his quote remains accurate. As the world struggles to contain the spread of COVID-19, CLAIMANT is developing a vaccine against the disease based on RESPONDENT NO. 1's GorAdCam vectors. Having concluded Phase II of clinical trials with very promising results, it is on track to make a decisive contribution in the fight to end the pandemic. An effective vaccine could be the proverbial ounce of prevention. Unfortunately, Ross claims that it was granted an exclusive license for the use of the vectors by RESPONDENT NO. 2, forcing CLAIMANT to initiate arbitral proceedings against RESPONDENTS due to the non-conformity of the goods.

Granted, Benjamin Franklin might be even more famous for his quote "Join, or Die." [*Pennsylvania Gazette, 9 May 1754*]. That, however, is not an appropriate sentiment for arbitral proceedings. Despite international arbitration being based on consent, RESPONDENTS are attempting to force a joinder of Ross to these proceedings against the explicit objection of both Ross itself and CLAIMANT. The Tribunal is respectfully requested not to order such a joinder (**Issue 1**).

In today's time, even Benjamin Franklin would probably agree that "Separate, and Live." might be more apt. Even in the year 1773, he knew that people "often catch cold from one another when shut up together in close rooms, coaches, etc., and when sitting near and conversing so as to breathe in each other's transpiration." [*Letter to Dr. Rush, 1773*]. To limit such a spread of COVID-19, restrictions of travel and face to face interaction have been imposed around the world. Thus, it might be impossible to conduct the witness and expert hearings at the scheduled time in May 2021. Should that be the case, the Tribunal is respectfully requested to order virtual hearings instead of delaying CLAIMANT's access to justice indefinitely (**Issue 2**).

Contrary to what RESPONDENTS now argue, the agreement between the Parties, the PCLA, is not a mere license agreement. Instead, it is predominantly a sale of goods and therefore governed by the CISG (**Issue 3**).

Since Ross alleges that it holds an exclusive license for the GorAdCam vectors, the goods delivered by RESPONDENT NO. 1 are not free from a third-party claim. RESPONDENT NO. 1 thus breached its obligation pursuant to Art. 42 CISG. CLAIMANT now seeks an ounce of prevention in the form of declaratory relief (**Issue 4**).

ISSUE 1: ROSS CANNOT AND SHOULD NOT BE JOINED TO THE ARBITRAL PROCEEDINGS

1 CLAIMANT and RESPONDENT NO. 1 have been business partners since the conclusion of the PCLA in January 2019. When a dispute arose concerning the goods delivered by RESPONDENT NO. 1, CLAIMANT was forced to initiate arbitration proceedings on the grounds of Section 14.1 PCLA [hereafter: Arbitration Agreement].

2 On 14 August 2020, RESPONDENTS filed a request to join Ross to the pending arbitral proceedings [*Answer, p. 28, para. 22*]. If granted, the request would involve a third party in this arbitration, and result in it being bound by an award despite never agreeing to participate. Likewise, the joinder would drag CLAIMANT into a conflict it is foreign to. Since both Ross and CLAIMANT strongly object to the joinder, it would have to be conducted against their expressed will and thus endanger the integrity of an award rendered by the Tribunal. This risk is all the more unnecessary, since Ross is not needed to solve the dispute between CLAIMANT and RESPONDENTS. Ultimately, RESPONDENTS' request aims to solve their disagreements with Ross on CLAIMANT's time and at its expense, while neglecting the very foundation of arbitration: the consent to arbitrate.

3 Ross cannot be joined to the arbitral proceedings as neither CLAIMANT nor Ross consented to a joinder (**A**). Even if Ross could be joined, the Tribunal should not do so in the case at hand (**B**). Therefore, the Tribunal is respectfully invited to reject RESPONDENTS' joinder request.

A. Ross Cannot Be Joined Since Neither CLAIMANT nor Ross Consented

4 A joinder of Ross is not possible in the present case. In order to join a third party to arbitral proceedings, it is necessary that all parties consent to the joinder (**I**) Presently, neither Ross nor CLAIMANT consented to such a joinder (**II**).

I. Joining a Third Person to Arbitral Proceedings Requires Consent

5 A joinder is not possible without the consent of all parties involved. As Danubia is the seat of the current arbitration, the applicable *lex loci arbitri* is Danubian Arbitration Law, which is a verbatim adoption of the UNCITRAL Model Law on International Commercial Arbitration with the 2006 amendments. Pursuant to Art. 19(1) Danubian Arbitration Law, the parties can freely choose the law governing the arbitral proceedings. CLAIMANT and RESPONDENT NO. 1 chose the Swiss Rules of International Arbitration [hereafter: Swiss Rules] to govern their proceedings [*Exhibit C3, p. 16, sec. 14.1*]. Firstly, a joinder under Art. 4(2) Swiss Rules requires consent of the parties, especially of the party to be joined (**1**). Secondly, the *lex loci arbitri* requires consent for a joinder (**2**). Thirdly, a lack of party consent creates the risk of the award being set aside (**3**).

1. Consent Is Needed When Ordering a Joinder Under Art. 4(2) Swiss Rules

6 The power of arbitral tribunals to join a third party is contingent on the consent of the parties to the proceedings, and especially the party to be joined. The parties' mutual consent to arbitrate is the cornerstone of arbitration [*Choi, p. 33; Drude, p. 231; Palay/Landon, p. 14; Müller/Keilmann, p. 113; Youssef et al., p. 72 et seq.*]. In contrast to state courts, arbitral tribunals derive their jurisdiction from the consent of the parties as declared within the arbitration agreement [*AT&T v Workers, US Sup Ct 7 Apr 1986; Mohs, p. 8; Schmidt-Ahrendts/Schmitt, p. 522; Palay/Landon, p. 14*]. Arbitral authority is thus limited to what the parties have contractually agreed upon [*Shackelford, p. 900; Strong, p. 922; cf. Chloro Controls v Severn Trent, India Sup Ct 28 Sep 2012*]. When parties enter into an arbitration agreement, they only bind themselves to arbitrate their disputes arising out of the specific contract containing the arbitration agreement, unless they explicitly agree otherwise.

7 This requirement of consent also applies to the joinder of third parties under the Swiss Rules. While Art. 4(2) Swiss Rules does not explicitly mention consent, it is generally acknowledged that joining third parties to arbitral proceedings requires their consent [*ICSID 8 Feb 2013; ICSID 5 Oct 2020; Zuberbühler/Bärtsch/Petti, Art. 4, para. 46; Choi, p. 33; cf. Born, p. 228*]. If the Swiss Rules had intended to dismiss that requirement, this would have been expressly stated [*Gómez Carrión, p. 497; Patocchi, p. 30; Voser, p. 392; Zuberbühler/Bärtsch/Petti, Art. 4, para. 46*]. However, Art. 4(2) Swiss Rules does not do so. Instead, the provision has a declaratory function, stressing that the parties cannot conduct a joinder out of their own volition without the arbitral tribunal's approval [*Habegger, p. 279; Voser, p. 396; Zuberbühler/Bärtsch/Petti, Art. 4, para. 46*]. Therefore, consent of the parties is required to order a joinder pursuant to Art. 4(2) Swiss Rules.

8 This prerequisite of consent is particularly important regarding the third party. A third party joined to arbitral proceedings is bound by the resulting arbitral award, even if they are not a signatory of the arbitration agreement. In the case of a non-signatory being joined, there is no arbitration agreement demonstrating consent to arbitrate. Thus, it is of paramount importance that this party explicitly consents to a request for joinder.

2. The *Lex Loci Arbitri* Requires Consent to Join a Third Party

9 The Danubian Arbitration Law as the *lex loci arbitri* does not allow for the joinder of a third party without consent. The Swiss Rules are limited by the mandatory law at the seat of arbitration, which the parties cannot derogate from [*Morrissey/Graves, p. 344; Schmidt-Ahrendts/Schmitt, p. 527; Wahab, p. 19*]. According to Art. 7(1) Danubian Arbitration Law, the decision of parties to arbitrate must be expressed in an arbitration agreement. Without an arbitration agreement between two parties, there is no basis upon which they could conduct arbitration [*Bantekas et al./Bantekas/Ortolani,*

p. 116; Born, p. 177; Lew/Mistelis/Kröll, p. 99; cf. Schmidt-Ahrendts/Schmitt, p. 521]. In case of a joinder, such an agreement will often be missing between the third party and at least one of the parties to the pending proceedings. In that case, only the consent of the parties who had previously not agreed to resolve their disputes by arbitration can establish the authority of the arbitral tribunal.

10 To the contrary, forcibly joining a third party to arbitral proceedings without it ever consenting, and without the basis of an arbitration agreement, would undermine Art. 7(1) Danubian Arbitration Law. Thus, the Danubian Arbitration Law does not allow for a joinder without consent.

3. Joining Ross Without its Consent Endangers the Award

11 An award based on proceedings in which a party has been joined without its consent is susceptible to being set aside [*cf. Dallah v The Ministry of Religious Affairs, UK Sup Ct 3 Nov 2010; Gómez Carrión, p. 498; Palay/Landon, p. 14; Voser, p. 392; Platte, p. 68; Shackelford, p. 900*]. If there is no arbitration agreement, an award can be set aside pursuant to Art. 34(2)(a) Danubian Arbitration Law. As was shown above, an arbitration agreement can only be extended to non-signatories with the consent of all parties to the agreement. Hence, joining a third party without its consent would constitute an invalid extension of the arbitration agreement, risking the setting aside of the award.

12 RESPONDENTS might argue that this risk could be eliminated if the Tribunal were to decide on the joinder in an interim award according to Art. 32(1) Swiss Rules. However, pursuant to Art. 16(3) Danubian Arbitration Law, the third party could challenge this interim award too, which it would be likely to do. The Tribunal would then have to decide whether to proceed with the arbitration, risking that a state court decision later on obliterates any progress made. Alternatively, it would have to suspend the proceedings for an undetermined amount of time while waiting for a decision on the challenge. Therefore, even with an interim award, the proceedings could be delayed considerably while the award remains at risk of being set aside. Ultimately, the third party must consent to the joinder if such risks are to be avoided.

13 Thus, the consent of all parties is required to grant RESPONDENTS' request for a joinder.

II. Neither Ross nor CLAIMANT Consented to the Joinder

14 Both CLAIMANT and Ross explicitly objected to RESPONDENTS' joinder request (**1**). Opting for the Swiss Rules cannot substitute consent (**2**).

1. Ross and CLAIMANT Explicitly Objected the Joinder Request

15 When RESPONDENTS filed their joinder request, CLAIMANT and Ross were consulted by the Tribunal. Subsequently, both CLAIMANT and Ross explicitly expressed their objection to the

request [*Letter Sinoussi, p. 46; Letter Langweiler, p. 48*], meaning two out of three parties oppose a joinder. Only RESPONDENTS, who want to resolve their dispute with Ross at the expense of CLAIMANT, favor a joinder.

2. Choosing the Swiss Rules Cannot Substitute Consent

16 Contrary to RESPONDENTS' allegation [*Answer, p. 28, para. 22*], the fact that CLAIMANT and Ross independently chose the Swiss Rules in their separate agreements, with their respective contractual partners, cannot substitute consent to a joinder. This view, if applied consistently, would mean that by choosing the Swiss Rules once, parties can be joined to any other pending arbitration governed by the Swiss Rules [*Voser, p. 395*].

17 The mere act of choosing a set of arbitration rules cannot result in such severe consequences. The similar phrasing of the separate arbitration agreements in the Ross Agreement and the PCLA does not support this outcome: The wording stems from the Model Clause provided by the SCAI, on which both contracts are based. Using a model clause is common practice and cannot be interpreted as CLAIMANT and Ross impliedly tending to the matter of a joinder. Instead, implied consent, resulting in arbitral proceedings with a non-signatory, can only be assumed if it was the parties' discernible intention to arbitrate with each other [*Sarhank v Oracle, US Ct App (2nd Circuit) 14 Apr 2005; Zuberbühler/Bärtsch/Petti, Art. 4, para. 47*]. This is presently not the case.

18 Firstly, such an intent cannot be ascribed to Ross in the present case. Ross concluded the Ross Agreement with RESPONDENT NO. 2 on 15 June 2014 [*Notice, p. 5, para. 8*]. This predates both Roctis's acquisition of RESPONDENT NO. 2 and the conclusion of the PCLA between RESPONDENT NO. 1 and CLAIMANT by more than four years [*Notice, p. 6, para. 11*]. RESPONDENTS thus suggest that Ross impliedly consented to be joined to proceedings between a company which might at some point in time be affiliated with RESPONDENT NO. 2 and a third, completely unrelated party. If this position were applied uniformly, Ross would even have consented to a joinder regarding completely unrelated companies, as long as they chose the Swiss Rules. Since this would lead to unforeseeable consequences, such an intention of Ross cannot be assumed.

19 Secondly, CLAIMANT did not impliedly consent to the joinder of any third party by choosing the Swiss Rules either. During the negotiations of the PCLA, CLAIMANT suggested to use the rules of a "respected and neutral arbitration [institution] such as UNCITRAL, the ICC, AAA or the Swiss Rules" [*PO 2, p. 57, para. 31*]. While the ICC Rules explicitly require consent for ordering a joinder, the UNCITRAL Rules go even further, requiring the third party to be a party to the arbitration agreement [*Art. 7 ICC Rules; Art. 17(5) UNCITRAL*]. For the AAA Rules, which do not provide for joinders at all, it is demanded that the arbitration agreement contains a "positive

conferment" of power to join a third party [*Bay Hotel v Cavalier, UKPC 16 Jul 2001*]. The template provided by RESPONDENT NO. 1 foreseeing an application of the Swiss Rules is therefore a mere coincidence. Thus, there was no intent of CLAIMANT to agree to the joinder of any third party.

20 Against this background, it cannot be assumed that CLAIMANT and Ross impliedly consented to a joinder simply by choosing the Swiss Rules. In fact, the aforementioned implications of such a proposition show that choosing the Swiss Rules cannot suffice to construct implied consent for a joinder of any party that also chose the Swiss Rules. Crucially, such an interpretation does not satisfy the requirement of an arbitration agreement having to govern a defined legal relationship [*Zuberbühler/Bärtsch/Petti, Art. 4, para. 46*] and would thus even conflict with the requirements of Art. 7(1) Danubian Arbitration Law.

21 For these reasons, the Tribunal is respectfully requested to find that it does not have the power to join Ross to the present proceedings.

B. Even If a Joinder Were Possible, It Should Not Be Ordered in the Case at Hand

22 Even if the Tribunal were to find that it had the authority to join Ross to the proceedings, it should not do so. Pursuant to Art. 4(2) Swiss Rules, the arbitral tribunal has to take into account "all relevant circumstances" when deciding whether to join a third party. RESPONDENTS do not have a legitimate interest in joining Ross (**I**). Additionally, joining Ross would lead to inefficient proceedings (**II**) whilst also infringing CLAIMANT's confidentiality rights (**III**).

I. RESPONDENTS Do Not Have a Legitimate Interest in Joining Ross

23 The joinder of a third party to pending proceedings requires that the balance of interest is clearly in favor of the requesting party [*Voser, p. 397; Arroyo/Schramm, p. 62*]. However, RESPONDENTS do not need a joinder of Ross to argue their case (**1**). Even if a participation of Ross were needed, it would suffice to consult its staff as witnesses (**2**).

1. RESPONDENTS Can Argue Their Case Without Ross

24 A joinder of Ross is not needed to solve the dispute at hand. It is the purpose of the ongoing proceedings to determine whether RESPONDENT NO. 1 has breached its contractual obligations under the PCLA by delivering goods that are subject to a third-party claim. Art. 42 CISG provides that "any right or claim" suffices to constitute a breach of contract. The provision assigns the responsibility for third-party claims to the seller [*Kröll et al./Kröll, Art. 42, para. 38; Metzger, p. 212*]. It thus aims to protect buyers like CLAIMANT from getting involved in disputes between the seller and a third party, such as the one between RESPONDENT NO. 2 and Ross. Determining the scope

of Ross's license falls within RESPONDENTS' sphere of risk. Hence, RESPONDENTS cannot be allowed to settle their dispute with Ross in the ongoing proceedings at CLAIMANT's expense. As CLAIMANT merely needs to prove the existence of a claim, a joinder of Ross is not necessary.

25 Moreover, the final award in the ongoing proceedings between CLAIMANT and RESPONDENTS does not run the risk of being contradicted by a future award rendered in an arbitration between Ross and RESPONDENT NO. 2. The dispute at hand concerns a breach of contract due to a mere *claim* whereas the latter proceedings would determine whether Ross has a *right*. Consequently, a decision in the present proceedings will not conflict with a potential future award rendered between Ross and RESPONDENT NO. 2, regardless of the respective outcomes.

2. In Any Case, Staff of Ross Can Be Consulted as Witnesses If Necessary

26 Even if the Tribunal considered it necessary to hear Ross on the facts of the case, employees of Ross could be called in as witnesses. Pursuant to Art. 15(2) and Art. 25(2) Swiss Rules, it is within the discretion of the arbitral tribunal to order witness hearings at any stage of the proceedings. Hence, employees of Ross could be called in as witnesses in the present proceedings. While they might refuse to appear, the same risk exists if Ross is ordered to join the proceedings against its will. If ordered to appear as a witness, however, the non-participation would be limited to the witness hearings and could not extend to the entire arbitration.

Hence, RESPONDENTS could obtain any additional facts they may wish for, without forcing Ross to be joined to the arbitral proceedings against its will. In conclusion, RESPONDENTS do not have any legitimate interest in joining Ross to the ongoing proceedings.

II. A Joinder of Ross Would Render the Proceedings Inefficient

27 A joinder of Ross would result in inefficient proceedings. Efficiency is a guiding principle in arbitration and one of its major advantages over state court proceedings [*Schmidt-Ahrendts/Schmitt, p. 521; cf. Voser/Stackpool-Moore, p. 34*]. The drafters of the Swiss Rules codified this fundamental principle in Art. 15(7) Swiss Rules, instructing all participants to "make every effort to contribute to the efficient conduct of the proceedings".

28 Joining Ross is likely to cause significantly lengthier proceedings as Ross has no incentive to participate. Parties that have no interest in participating in proceedings tend to adopt obstructionist behavior. This could, for example, entail delaying the submission of important documents [*Hosang, p. 82*]. Ross benefits from the present situation of uncertainty: It can use the possibility of having an exclusive license for respiratory diseases to put pressure on RESPONDENT NO. 2 during their negotiations. If Ross is joined to the proceedings, the Tribunal would presumably determine the

scope of the license, putting its advantage in the negotiations at risk. Therefore, since Ross has no incentive to participate, a joinder is likely to cause lengthier proceedings.

III. Joining Ross to the Proceedings Infringes the Confidentiality Rights of CLAIMANT

29 A joinder of Ross would also infringe upon CLAIMANT's confidentiality rights. Confidentiality in arbitration means that the subject matter and all relevant data may not be divulged [*Hassneh v Mew, EWHC 22 Dec 1992; cf. Ali v Trogir, EWCA 19 Dec 1997; Mistelis, p. 213*]. Joining a third party to pending arbitral proceedings ultimately entails the risk of a loss of confidentiality [*Born, p. 227*]. This is especially severe in the case at hand, since relevant information would be revealed to Ross, a direct competitor of CLAIMANT's, which is developing a vaccine against COVID-19 on the basis of the same viral vector technology. To secure the confidentiality of the proceedings, Section 10 of the PCLA stresses "that confidentiality and know-how protection is of paramount importance" [*Exhibit C3, p. 15*]. Hence, while confidentiality is an essential principle for arbitration in general, it is even more crucial in the case at hand.

30 In case of a joinder of Ross, this fundamental principle of confidentiality would be infringed upon. CLAIMANT has already revealed excerpts of its internal calculations [*Appendix, p. 59*]. Joining Ross would enable it to access this information. Details about CLAIMANT's cash flow would provide information about its investment and research strategy, allowing Ross to strategically adapt the price at which it sells a vaccine to consumers. Moreover, should Ross have an exclusive right to use GorAdCam vectors for a vaccine against COVID-19, CLAIMANT would eventually have to obtain a license from Ross permitting its use of the vectors. In this situation, Ross would know exactly which amount it can extract from CLAIMANT as it would be aware of CLAIMANT's investment strategy. This would put Ross in an extremely advantageous position during negotiations. Thus, the information about CLAIMANT's internal calculations is highly confidential, particularly towards Ross. A joinder would accordingly infringe CLAIMANT's confidentiality rights.

31 Consequently, the circumstances at hand weigh heavily against a joinder of Ross to the proceedings.

CONCLUSION OF THE FIRST ISSUE

32 Ross cannot be joined to the arbitral proceedings between CLAIMANT and RESPONDENTS. Without the Parties' consent, and particularly without the consent of Ross, the Tribunal does not have the authority to order a joinder of Ross. Even if the Tribunal had the power to do so, it should not exercise it, as a joinder of Ross is not required for RESPONDENTS to argue their case. Instead, it would lead to lengthier and less efficient proceedings whilst violating CLAIMANT's confidentiality rights. The Tribunal is therefore respectfully invited to deny RESPONDENTS' joinder request.

ISSUE 2: THE EXAMINATION OF WITNESSES AND EXPERTS SHOULD BE CONDUCTED VIRTUALLY IN MAY 2021

33 When the COVID-19 pandemic struck the world, international arbitration managed to stay on its feet by following Benjamin Franklin's advice to "look before, or you'll find yourself behind" [*Poor Richard's Almanack, 1735*]. Parties, arbitrators and counsel have been adapting to the new reality of conducting arbitrations in the face of travel restrictions and social distancing measures. Virtual hearings, which have been used in international arbitration for a considerable amount of time, are now – more than ever – an integral part of international arbitration.

34 In the present proceedings, witness and expert hearings are scheduled for May 2021. Contrary to RESPONDENTS' request [*Letter Fasttrack, p. 49*], these hearings should not be placed on hold indefinitely but rather be conducted virtually at the originally intended dates. Postponing the hearings until in-person hearings are possible would keep the legal status of CLAIMANT's research uncertain at a point in time when the development of a vaccine is needed the most.

35 Therefore, the Tribunal is respectfully requested to order virtual witnesses' and experts' hearings in the event that in-person hearings are not possible or considered to be inappropriate. Delaying the witness and expert examinations would violate CLAIMANT's access to justice (**A**). The Tribunal has the power to order virtual hearings (**B**) and should use its discretion to do so (**C**).

A. Delaying the Hearing Would Violate CLAIMANT's Access to Justice

36 "Justice delayed is justice denied" [*Redfern/Hunter, para. 5.67; Fan, COVID-19; Soudrin/Burstyner, p. 46; cf. Melcarne et al., p. 1*]. Adjourning the hearings would not only violate CLAIMANT's access to justice but even risk rendering the award useless for CLAIMANT. The parties' access to justice encompasses the right to have a decision delivered in a timely manner [*cf. OGH 23 Jul 2020; de Oliveira/Hourani, p. 15; cf. Clarke, p. 39; Cohen/Albertstein, p. 5, 31; Garth et al., p. 676; Gross, p. 2330; Redfern/Hunter, para. 5.67*]. This fundamental right is violated when hearings are postponed for an undetermined amount of time, which is why the default position must now be that hearings are conducted remotely [*Hyde v Nygate, EWHC 6 Apr 2020; Muncipio de Mariana v BHP, EWHC 20 Apr 2020*]. If the Tribunal decided against virtual hearings, it would have to postpone the hearings to a time when they are once again possible in-person [*PO 2, p. 58, para. 42*]. Due to conflicting schedules, hearings would not be possible until September 2021 at the earliest [*PO 2, p. 58, para. 42*]. However, since the development of the pandemic is unpredictable, adjourning the hearings would cause an indefinite delay of the proceedings. Thus, CLAIMANT's access to justice would be violated.

37 An indefinite delay would even risk the award being rendered useless for CLAIMANT. On the verge of developing an effective vaccine against COVID-19 using GorAdCam vectors, CLAIMANT could soon be able to make a decisive contribution towards the fight against the pandemic. However, without having certainty as to the legal status of its research, CLAIMANT has to reconsider producing a vaccine in large quantities. As long as this dispute remains unresolved, CLAIMANT faces the risk of damage claims by Ross potentially making the research unprofitable. An award which is rendered after the pandemic has ended would be pointless for CLAIMANT. Therefore, postponing the hearings would not only violate CLAIMANT's access to justice but even bear the risk of rendering the award useless for CLAIMANT.

B. The Tribunal Has the Power to Order Virtual Hearings

38 The Tribunal has the power to order virtual hearings. The Parties chose to allow virtual hearings (**I**) and the Danubian Arbitration Law does not preclude virtual hearings either (**II**).

I. The Parties Chose to Allow Virtual Hearings

39 The Parties chose the Swiss Rules, which explicitly provide for virtual hearings (**1**). Further, their Arbitration Agreement allows hearings to be held virtually as well (**2**).

1. The Swiss Rules Explicitly Provide for Virtual Hearings

40 The Swiss Rules provide rules for the taking of evidence and the conduct of oral hearings in Art. 24 and Art. 25 Swiss Rules. Art. 25(4) Swiss Rules states that "[t]he arbitral tribunal may direct that witnesses or expert witnesses be examined through means that do not require their physical presence at the hearing (including by videoconference)." The provision was revised in 2012 to include this sentence [*Zuberbühler/Nater-Bass/Rouvinez, Art. 25, para. 31; cf. Favre-Bulle, p. 30*]. By explicitly referring to videoconferences as a method of examination, Art. 25(4) Swiss Rules empowers the Tribunal to order virtual hearings.

41 The drafters of the revised Swiss Rules were not yet faced with a pandemic and thus likely did not envision a scenario in which all hearing participants would have to connect via videoconference. Nevertheless, Art. 25(4) Swiss Rules was meant to speed up proceedings in which participants are unable to attend the hearing, for example due to travel restrictions [*Arroyo/Nater-Bass/Pfisterer, p. 97; cf. Zuberbühler/Nater-Bass/Rouvinez, Art. 25, para. 31*]. In the present case, all the participants are affected by the pandemic, not just the witnesses and experts [*cf. Letter Sinoussi, p. 46*]. Since the purpose of the new version was to overcome such obstacles, it must be read to allow the Tribunal to order that all participants may join the hearing virtually. It does not make a difference whether only the witness attends the hearing via videoconference or whether all participants are connected

virtually. The decisive interaction between counsel and arbitrators on the one side and witnesses and experts on the other is virtual in both scenarios. Consequently, Art. 25(4) Swiss Rules empowers the Tribunal to order virtual hearings.

2. The Arbitration Agreement Allows for Virtual Hearings

42 The Arbitration Agreement allows for virtual hearings. There is consistent jurisprudence in all the countries concerned by this arbitration that in sales contracts governed by the CISG, the latter also applies to the conclusion and interpretation of the arbitration agreement [*PO 1, p. 52, para. 4*]. As will be shown below, the CISG applies to the PCLA [*see below para. 67 et seq.*], meaning that Art. 8 CISG should govern the interpretation of the Arbitration Agreement.

43 There was no intent of the Parties to exclude virtual hearings (**a**). A reasonable person would not conclude that virtual hearings are excluded (**b**). To the contrary, had the Parties been aware of the upcoming pandemic, they would likely have explicitly chosen to conduct hearings virtually (**c**).

a. The Parties Did Not Intend to Exclude Virtual Hearings

44 There was no intent of the Parties to exclude virtual hearings. Pursuant to Art. 8(1) CISG, any statements are to be interpreted according to the parties' intent where the other party knew or could not have been unaware of it. The Arbitration Agreement consists of the Model Arbitration Clause provided by the SCAI and an additional phrase. According to this additional phrase, "[h]earings shall be held, at the Arbitral Tribunal's discretion, either in Vindobona or the city where the Respondent has its place of business" [*Exhibit C3, p. 16, sec. 14.1*]. This addition stems from the arbitration agreement contained in the Ross Agreement [*Exhibit R2, p. 31, para. 8*]. During the negotiations between CLAIMANT and RESPONDENT NO. 1 in 2018, the issue of virtual hearings was not discussed [*PO 2, p. 57, para. 32*]. Even the original drafters of the additional phrase – RESPONDENT NO. 2 and Ross – did not intend to exclude virtual hearings. They included the phrase in 2014 to accommodate, at least in part, Mr. Doherty's proposal that in cases brought against RESPONDENT NO. 2, hearings should be held in Equatoriana [*PO 2, p. 57, para. 32*]. Thus, neither the Parties nor the original drafters intended to exclude virtual hearings.

b. A Reasonable Person Would Not Assume Virtual Hearings to Be Excluded

45 A reasonable person would conclude that virtual hearings are not excluded. Pursuant to Art. 8(2) CISG, if no intent can be determined, "statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances." Art. 8(3) CISG specifies that all relevant circumstances, including subsequent conduct, have to be considered for this purpose.

46 Firstly, according to the understanding of a reasonable person, the term "hearing" within the Arbitration Agreement does not exclude "virtual hearings". A hearing is an oral and synchronous exchange of arguments or evidence – as opposed to a written and asynchronous exchange known as documents-only proceedings [*Scherer, p. 12; Hanessian/Casey, p. 27; Hristova/Robach, Virtual Hearings; ICC Guidance Note, para. 23*]. Evidence is exchanged orally and simultaneously both in physical and virtual conferences. Consequently, virtual hearings are not excluded by the term "hearing" according to the understanding of a reasonable person.

47 Secondly, the phrase providing that hearings shall be held "at the Arbitral Tribunal's discretion, either in Vindobona or in the city where the Respondent has its place of business" [*Exhibit C3, p. 16, sec. 14.1*] does not mandate in-person hearings. In a 2001 judgment, the High Court of England and Wales ruled on an award which dealt with an arbitration agreement providing for hearings either in Shenzhen or Shanghai [*Tongyuan v Uni-Clan, EWHC 19 Jan 2001*]. The court decided that despite this, the arbitral tribunal was allowed to hold the arbitration in Beijing, since the parties did not make it clear in their agreement that the venue was considered to be of fundamental importance. Here, CLAIMANT does not even ask for hearings in a different physical location, but instead only requests that they are conducted virtually. The phrase in the Arbitration Agreement between CLAIMANT and RESPONDENT NO. 1 provides for possible locations at which hearings shall be held. The original purpose of this phrase was to accommodate the respective respondent by including its place of business as a location [*cf. PO 2, p. 57, para. 32*]. Since RESPONDENTS can join from their place of business, virtual hearings still serve this purpose. Accordingly, the locations chosen can hardly be construed to be of such importance that virtual hearings are excluded. A reasonable person would therefore not interpret the phrase, which leaves the decision between two locations to the Tribunal, to mandate in-person hearings.

48 Thirdly, the Parties' subsequent conduct confirms the understanding of a reasonable person that virtual hearings are not excluded. Faced with the pandemic, both Parties expressed their interest to avoid unnecessary delays [*Letter Langweiler, p. 48; Answer, p. 28, para. 17*]. Insisting on in-person hearings and thereby causing an indefinite delay of the hearings contradicts this interest. In light of this subsequent conduct, a reasonable person would assume virtual hearings to be possible.

49 Even if an interpretation under Art. 8 CISG were not conclusive, an interpretation *contra proferentem* would lead to virtual hearings being allowed. If a term is unclear, the party having drafted the term cannot rely on its ambiguity [*CIETAC 7 Jan 2000; ICDR 28 Mar 2007; Chan/Fan, p. 1; Eiselen, AC Opinion No. 13, para 9.1; Schlechtriem/Schwenzer/Schroeter/Schmidt-Kessel, Art. 8, para. 47; Gaillard, p. 67*]. The template for the Arbitration Agreement was provided by RESPONDENT NO. 1 and was not changed [*PO 2, p. 57, para. 32*]. Therefore, RESPONDENTS could not rely on an ambiguity of

the Arbitration Agreement to argue that virtual hearings are excluded. A reasonable person would thus conclude that the Arbitration Agreement allows for virtual hearings.

c. Had the Parties Been Aware of the Pandemic, They Likely Would Have Explicitly Chosen Virtual Hearings

50 Had the Parties been aware of an upcoming pandemic, they would have been likely to explicitly choose virtual hearings. In case the parties' intent is undeterminable, the hypothetical intent has to be considered [*HCC 21 Jun 1996; cf. OLG Köln 2 Jul 2007; Brunner/Hurni, Art. 8, para. 22; Schlechtriem/Schwenzer/Schroeter/Schmidt-Kessel, Art. 8, para. 27; Witz/Salger/Lorenz/Witz, Art. 8, para. 3; cf. Kröll et al./Zuppi, Art. 8, para. 33*]. Looking back at the negotiations of the PCLA in late 2018 [*Notice, p. 6, para. 12; PO 2, p. 57, para. 32*], the Parties involved were unable to predict the pandemic and its impact on international arbitration. However, it is reasonable to assume they would have done everything necessary to mitigate the effects of COVID-19 when drafting their dispute resolution clause. Choosing virtual hearings is the most obvious way of doing so.

II. The Danubian Arbitration Law Does Not Preclude Virtual Hearings

51 The *lex loci arbitri* does not preclude virtual hearings. In the present proceedings, the Parties chose the Swiss Rules, which allow virtual hearings. The parties' autonomy is only limited by the mandatory rules of the *lex loci arbitri* [*Lew/Mistelis/Kröll, para. 2.44; Morrissey/Graves, p. 344*].

52 Contrary to RESPONDENTS' allegations [*Letter Fasttrack, p. 49*], Art. 24(1) Danubian Arbitration Law does not represent a mandatory rule restricting the Tribunal's discretion to order virtual hearings. Art. 24(1) Danubian Arbitration Law stipulates that "unless the Parties agreed that no hearings shall be held, the tribunal shall hold [oral] hearings at an appropriate stage of the proceedings, if so requested by a party." As clarified above, the term "hearing" includes virtual hearings [*see above para. 46*]. The additional term "oral" merely means spoken and not written [*Waincymer, p. 6; cf. Galindo, Virtual Hearings; HKIAC AAR, para. 22.4*] and therefore does not restrict the Tribunals discretion. Likewise, Art. 20(2) Danubian Arbitration Law does not prohibit virtual hearings. The purpose of Art. 20(2) Danubian Arbitration Law is to prevent the arbitral tribunal from setting the hearings in a geographical location that deviates from the parties' agreement [*Bantekas et al./Ortolani, p. 587*]. In the present case, the potential locations were included to avoid the respondent having to travel abroad, but not to exclude virtual hearings [*see above para. 47*]. In conclusion, neither Art. 20(2) nor Art. 24(1) Danubian Arbitration Law restrict the Tribunal's discretion to order virtual hearings.

C. The Tribunal Should Order Virtual Hearings

53 The Tribunal should grant CLAIMANT access to justice by ordering virtual hearings. Any concerns regarding the proper conduct of virtual hearings can be addressed appropriately (**I**). Thus, virtual hearings do not infringe the fundamental rights of the Parties (**II**). This is confirmed by arbitral hearings being conducted virtually across the world (**III**).

I. Concerns Regarding the Conduct of Virtual Hearings Can Be Addressed Appropriately

54 Any concerns regarding the time difference, the assessment of the witnesses' or experts' credibility, witness tampering, and cybersecurity can be addressed effectively. Courts and tribunals worldwide agree that remote examinations can be conducted effectively [*OGH 23 Jul 2020; Pack v Triad Plastics, OSCJ 1 Oct 2001; R v Allen, ONCJ 24 Apr 2007; Chandra v CBC, OSCJ 31 Aug 2015; Tetra Pak v Musashi, FCA 5 Sep 2000; Seymour v Commissioner of Taxation, FCA 2 Mar 2016; Polanski v Condé Nast, UKHL 10 Feb 2005; Cyberworks v MEI AH, HKCFI 28 Feb 2020; cf. ICSID 24 Sep 2020; ICDR 14 Jul 2020; ICSID 21 Sep 2020; cf. Scherer, p. 21, Lichtenstein/Ruckteschler, p. 13*].

55 Firstly, an approach commonly chosen to mitigate issues arising from the time difference is to shorten the individual hearings while increasing the number of hearings accordingly [*cf. ICSID 3 Jul 2020; ICDR 14 Jul 2020; ICSID 24 Sep 2020; Bassiri, p. 110; Lo, p. 90; Scherer, COVID-19, p. 13; Stein, p. 174; cf. Vidak-Gojkovic/McIlwrath, p. 196*]. In the present case, the virtual hearings could be scheduled at a reasonable time in the morning of RESPONDENTS' seat of business, which would still allow participants from CLAIMANT's location to join in the evening.

56 Secondly, the witnesses' and experts' credibility can still be assessed effectively. Providing video transmission and a set-up including large screens and multiple cameras allows all participants to enjoy a full view of the witness or expert and thus pick up non-verbal cues such as body-language [*Hosking/Cardoso, p. 14; Mirani, Due Process; Scherer, p. 20; Singer, p. 33; Bassiri, p. 115*]. Recording the hearing would further enable the tribunal to review the testimony, for example during deliberations [*Scherer, COVID-19, p. 9*]. All participants involved in the present hearing, including RESPONDENTS, have sufficient bandwidth and equipment to guarantee that a hearing can be held [*PO 2, p. 58, para. 38*]. Thus, RESPONDENTS' would not be put at a disadvantage.

57 Thirdly, concerns that remotely heard witnesses and experts might be coached can be effectively addressed. A separate camera, capturing the entire room, can ensure that no one else is nearby [*Beserman Balco, p. 132; Gielen/Wahnschaffe, p. 260; Hosking/Cardoso, p. 16; Rowden/Wallace, p. 512; Scherer, p. 22*]. Moreover, the testifying person can be instructed to look directly into the camera and to keep his or her hands visible onscreen at all times [*OGH 23 Jul 2020; Scherer et al.,*

Due Process]. The risk of witness tampering is therefore not greater than in case of in-person hearings, where a witness's testimony can be prepared prior to the hearing.

58 Lastly, RESPONDENTS do not suffer a disadvantage due to potential cybersecurity challenges. As is the case with in-person hearings, third-party interference during virtual hearings cannot be excluded with absolute certainty [*cf. ICCA-NYC Bar-CPR Protocol, pp. 21 et seq.*]. Various institutions offer guidelines to best address security and confidentiality issues [*ICCA-NYC Bar-CPR Protocol; ICCA-IBA Roadmap*]. Also, by conducting a trial run prior to the official hearing and consulting IT support, the risk of technical issues can be reduced significantly [*ICSID 24 Sep 2020; ICSID 6 Oct 2020; Bassiri, p. 116; Bateson, p. 166; Singer, p. 32*].

59 Any concerns regarding the time difference, the assessment of the witnesses' or experts' credibility, witness tampering, and cybersecurity can therefore be addressed effectively.

II. The Parties' Fundamental Rights Remain Safeguarded

60 Despite RESPONDENTS' objection [*Letter Fasttrack, p. 49*], virtual hearings safeguard the Parties' fundamental rights. Since any concern regarding the proper conduct of virtual hearings can be addressed appropriately, the Parties' right to equal treatment and right to be heard are maintained. In a landmark decision in July 2020, the Austrian Supreme Court dealt with an award in which the arbitral tribunal ordered virtual hearings despite the respondent's objection, ruling that virtual hearings sufficiently guarantee due process [*OGH 23 Jul 2020*]. The court elaborated that virtual hearings grant the parties a fair and equal opportunity to present their case. Likewise, an arbitral tribunal permitted videoconferences as a method of examination under the old Swiss Rules, which did not yet explicitly provide for them, despite the objections of one party [*SCAI 28 Jun 2012*]. Concerns regarding potential inequalities due to the time difference, witness tampering or third-party interference were deemed to be unfounded. Likewise, the concerns raised by RESPONDENT NO. 1 regarding the efficacy of the hearing can be addressed effectively. Thus, the Parties' right to equal treatment and right to be heard are safeguarded even without RESPONDENTS agreeing to virtual hearings.

61 The national procedural laws in Equatoriana and Danubia show that virtual hearings can be conducted without infringing upon the Parties' fundamental rights. Both countries allow virtual hearings in state court proceedings even if not all parties consent, although in Danubia, such hearings must then be required by public interest [*PO 2, p. 57, para. 37*]. Even if the higher standard of Danubian law were applicable, the urgent need for a vaccine represents one of the greatest public interest at the current time. Only a timely resolution of this dispute would reassure CLAIMANT that it can legally distribute a vaccine against COVID-19 immediately upon obtaining regulatory

approval. Thus, the Tribunal's discretion is not restricted in ordering that the examination of witnesses and experts should be conducted remotely.

III. The Legitimacy of Virtual Hearings Is Reflected by Their Widespread Use

62 The worldwide conduct of virtual hearings confirms that they are an effective alternative during the current pandemic. Various arbitral institutions published guidelines for the procedural preparation of remote hearings [*Flecke-Giammarco et al., p. 137; Rahman, Cybersecurity; Shope, p. 74; Wilske, p. 16 et seq.; cf. Rowden et al, p. 13*]. The Seoul Protocol explicitly focusses on the proper approach to virtual witness and experts' examinations [*Hong/Hwang, Seoul Protocol; Seoul Protocol; Yu, p. 54;*] Similarly, other soft law instruments, such as Art. 8(1) IBA Rules, provide for witness hearings via videoconference.

63 Even before the pandemic, hearings of witnesses and experts were often conducted virtually [*cf. ICC 31 Mar 2014; UNCITRAL 28 Apr 2011; ICSID 10 Feb 2012; ICSID 15 Dec 2010; Mak, Due Process; Scherer, Asynchronous Hearings; Scherer, NYDRL*]. In fact, videoconferencing has been widely used in international arbitration with surveys showing a majority to be in favor of more frequent use in the future [*Queen Mary Survey, p. 3*]. Unsurprisingly, the COVID-19 pandemic has resulted in a major increase of virtual hearings [*cf. PCA 13 Jun 2020; ICC 12 Jun 2020; ICDR 14 Jul 2020; ICSID 5 Nov 2020; ICSID 22 Oct 2020; ICSID 18 Sep 2020; ICSID 12 Aug 2020; ICSID 6 Jul 2020; Bateson, p. 159; Born, Survey, p. 141; Wilske, p. 16; cf. Wilske et al., p. 104*].

64 Lastly, even state courts, which are generally less flexible with regard to their procedure than arbitral tribunals [*Redfern/Hunter, para. 1.104*], are adapting to the unprecedented circumstances by switching to virtual hearings [*Re A, EWHC 30 Apr 2020; Bank of KZ v Bank of NY, EWHC 22 Apr 2020; SFK v HWH, HKCA 8 Apr 2020; Cyberworks v MEI AH, HKCFI 28 Feb 2020; Capic v Ford, FCA 15 Apr 2020; cf. Fowler v Commissioners, UK Sup Ct 20 May 2020; R v Parole Board, UK Sup Ct 4 Dec 2020*]. This reflects a widespread acceptance of the format.

65 For these reasons, the Tribunal should order virtual hearings in the present case.

CONCLUSION OF THE SECOND ISSUE

66 The Tribunal is respectfully requested to order virtual witnesses' and experts' hearings in case an in-person hearing is not possible at the scheduled dates in May 2021. Postponing the hearings would infringe upon CLAIMANT's access to justice, since a timely decision for the dispute is of vital importance. The Swiss Rules give the Tribunal the power to order virtual hearings and it should exercise this power, considering that potential concerns regarding a virtual hearing can be addressed appropriately.

ISSUE 3: IS THE CISG APPLICABLE TO THE PURCHASE, COLLABORATION AND LICENSE AGREEMENT

67 In December 2018, RESPONDENT NO. 1 was in search of buyers for its GorAdCam vectors, HEK-294-cells and cell growth medium [*cf. Exhibit R2 p. 31, para. 9; PO 2, p. 56, para. 26*]. The GorAdCam vectors are carrier organisms that can form the basic structure for a vaccine by being modified to contain a gene of the virus which the vaccine is directed against [*Notice, p 4, para. 3*]. The vectors, HEK-294 cells and growth medium are necessary for CLAIMANT's research and production of vaccines against respiratory diseases, specifically COVID-19. In order to develop a vaccine, it is firstly necessary to research vectors modified with different genes of interest. In a second step, these vectors have to be amplified using special growth medium and HEK-cells. These cells function as "hosts" for the production and amplification of the modified vectors [*Notice, p. 5, para. 5*]. The third and final step is the large-scale production of a vaccine. In the agreement between the Parties, the PCLA, CLAIMANT agrees to buy GorAdCam vectors, HEK-294 cells and growth medium from RESPONDENT NO. 1. In addition, the PCLA contains the option for CLAIMANT to have its vaccine produced by RESPONDENT NO. 1. Since the vectors are protected by an IP-right, CLAIMANT was further granted a non-exclusive license by RESPONDENT NO. 1 to enable their use.

68 RESPONDENTS now claim that the CISG is not applicable to the PCLA, arguing that it is a mere license agreement [*Answer, p. 28, para. 19*]. To the contrary, the PCLA is a mixed contract (**A**). Two out of the three main obligations arising from it constitute sales of goods (**B**). These obligations form the preponderant part of the contract within the meaning of Art. 3(2) CISG (**C**). The CISG is therefore applicable to the contract.

A. The Purchase, Collaboration and License Agreement Is a Mixed Contract

69 The license part of the PCLA does not suffice to exclude the applicability of the CISG, as the agreement is a mixed contract preponderantly concerned with a sale of goods. The geographical requirements pursuant to Art. 1(1)(a) CISG are met. CLAIMANT and RESPONDENT NO. 1 have their place of business in Mediterraneo and Equatoriana respectively, both of which are contracting States of the CISG [*PO 1, p. 52, para. 3*]. Contracting States necessarily incorporate the CISG into their domestic law, meaning that it is applicable as long as the parties have not explicitly opted to exclude its application [*BGer 17 Jul 2007; BP v PetroEcuador, US Ct App (5th Circuit) 11 Jun 2003; OGH 22 Oct 2001; CdA Paris 6 Nov 2001; BGH 23 Jul 1997; BGH 25 Nov 1998; BGH 11 May 2010*]. The Parties' choice of the laws of Danubia [*Exhibit C3, p. 16, sec. 15.2*] therefore

does not exclude the application of the CISG, because the Parties have not explicitly chosen otherwise.

70 To cover the whole process of development and production of a vaccine, the Parties agreed on three different main obligations, which are

1. the purchase of a first batch of GorAdCam vectors under Section 9.2, to be delivered by RESPONDENT NO. 1 in exchange for an upfront payment made by CLAIMANT,
2. the License Grant under Section 5, wherein RESPONDENT NO. 1 grants CLAIMANT a non-exclusive license for the use of GorAdCam vectors in the field of respiratory diseases, and
3. the obligations under Section 16, whereof
    a. Section 16.1 provides the obligation for CLAIMANT to acquire all its need of HEK-294 cells and growth medium required for the amplification from RESPONDENT NO. 1 and
    b. Section 16.2 provides the option for CLAIMANT to have its final vaccine produced by RESPONDENT NO. 1 at the market price generally charged at the time of conclusion of the contract.

71 These obligations are supported by a research collaboration, for which the basic outlines are provided in Section 3.1. The PCLA further addresses points such as confidentiality, warranties, and dispute resolution [*Exhibit C3, p. 15 et seq.*].

72 The PCLA is therefore a contract containing mixed obligations. As such, it is governed by the CISG, if its preponderant part is a sale of goods. The application of the CISG is specified by Art. 3(2) CISG, which excludes contracts "[…] in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labor or other services" from the scope of the CISG. While Art. 3(2) CISG explicitly addresses labor and service elements, the rule amounts to a general principle in the meaning of Art. 7(2) CISG, under which only contracts preponderantly concerned with obligations that are not sales of goods are excluded from the scope of the CISG [*cf. OGH 22 Nov 2011; BeckOGK/Wagner, Art. 1, para. 8; Staudinger/Magnus, Art. 3, para. 30; MüKo-BGB/Huber, Art. 3, para. 3; Piltz, para. 2-34*]. Thus, the license included in the PCLA does not exclude the application of the CISG as long as the preponderant part of the contract is a sale of goods.

B. Two of the Three Main Obligations of the PCLA Are Sales of Goods

73 Two of the three main obligations of the PCLA are sales of goods, namely the purchase of GorAdCam vectors (**1**) and the obligations in Section 16 (**2**).

I. The Purchase of the GorAdCam Vectors Is a Sale of Goods

74 Section 9.2 of the PCLA, which obliges RESPONDENT NO. 1 to deliver a first batch of vectors to CLAIMANT in exchange for an upfront payment of EUR 2,500,000, is a sale of goods. The obligations of a sales contract are set out in Art. 30 and 53 CISG: the seller is bound to deliver the goods and transfer their property, while the buyer is obliged to pay the price and accept the goods [*OGH 10 Nov 1994; Kröll et al./Mistelis, Art. 1, para. 25; BeckOGK/Wagner, Art 1, para. 5*]. Goods in the sense of the CISG are moveable and typically tangible objects [*RB Rotterdam 2 Dec 2015, HG Kanton Aargau 10 Mar 2010; Kröll et al./Mistelis, Art. 1, para. 37*]. The vectors are delivered in a batch [*Exhibit C3, p. 13, sec. 9.2*] and therefore are moveable. Despite their small size, the vectors are still tangible. Hence, Section 9.2 establishes corresponding obligations between the parties in the meaning of Art. 30 and 53 CISG: RESPONDENT NO. 1 is bound to deliver the GorAdCam vectors and transfer property to CLAIMANT, whereas CLAIMANT is obliged to accept the vectors and pay the purchase price.

75 The license being appended to the purchase of the vectors does not alter this conclusion. It was simply included to ensure the use of the vectors and is thus an ancillary obligation. RESPONDENT NO. 1 granted CLAIMANT a perpetual, non-exclusive license required to enable the use of the GorAdCam vectors. CLAIMANT therefore obtained a permanent right of use, becoming owner of the vectors in virtually all aspects and can use the vectors for its purposes of researching and developing a vaccine.

76 In this regard, the PCLA is comparable to software transactions, which are generally classified as a sale of goods [*OLG Koblenz 17 Sep 1993; OLG Köln 26 Aug 1994; RB Arnhem 28 Jun 2006; RB Midden-Nederland 25 Mar 2015*]. Software is protected by IP-rights and sold with a license that permits its use [*cf. RB Midden-Nederland 25 Mar 2015*]. While the seller retains copyright when software is sold with a permanent license, the buyer is granted a permanent right of use and ownership in all aspects except for the copyright and third-party restrictions [*RB Arnhem 28 Jun 2006; RB Midden-Nederland 25 Mar 2015; cf. OLG Köln 26 Aug 1994; Gillette/Walt, p. 54; Schlechtriem/Schroeter, para. 87*]. Similarly, CLAIMANT now has a permanent right of use that allows it to use the GorAdCam vectors for its purposes. Thus, the license does not alter the classification as a sale of goods.

II. The Obligations in Section 16 Are a Sale of Goods

77 Both the Purchase Obligation under Section 16.1 (**1**) and the Production Option under Section 16.2 (**2**) provide for a sale of goods.

1. The Purchase Obligation under Section 16.1 Constitutes a Sale of Goods

78 For the final production of a vaccine, the modified vectors have to be amplified. This requires HEK-294 cells and growth medium. Section 16.1 obliges CLAIMANT to obtain its need of these materials from RESPONDENT NO. 1, who is thus required to deliver moveable materials. CLAIMANT is obliged to accept these and pay the agreed-on price [*Exhibit C3, p. 17*]. Hence, Section 16.1 establishes sales obligations, making the Purchase Obligation a sale of goods.

79 This is not precluded by the obligations only becoming effective when the vaccine is commercialized or by the quantity of the goods being fixed to CLAIMANT's need. Firstly, the CISG encompasses sales subject to conditions [*CdA Colmar 12 Jun 2001; OLG Schleswig 29 Oct 2002 OLG Graz 7 Mar 2002; Schlechtriem/Schwenzer/Schroeter/Ferrari, Art. 1, para. 15; Staudinger/Magnus, Art. 1, para. 41*]. Secondly, it suffices that the quantity of the goods is determinable. This is the case in so-called input contracts, which refer to the buyer's entire demand [*Secretariat Commentary, Art. 12, para. 12; Witz/Salger/Lorenz/Witz, Art. 14, para. 33; Kröll et al./Ferrari, Art. 14, para. 24; Staudinger/Magnus, Art. 14, para. 21; Enderlein/Maskow, Art. 14, para. 9*]. As Section 16.1 refers to CLAIMANT's need of HEK-294 cells and growth medium, the quantity of the goods is sufficiently determinable. In conclusion, the Purchase Obligation is a sale of goods.

2. The Production Option under Section 16.2 Provides for a Sale of Goods

80 If CLAIMANT were to choose the option to buy vaccines produced by RESPONDENT NO. 1, this would constitute a sale of goods under Art. 1(1) CISG (**a**). CLAIMANT would not supply a substantial part of the necessary materials in the sense of Art. 3(1) CISG (**b**).

a. The Production Option Provides for a Sale of Goods under Art. 1(1) CISG

81 Section 16.2 provides for a sale of goods under the CISG. This section gives CLAIMANT the option to have its vaccines produced by RESPONDENT NO. 1, using the purchased growth medium and HEK-294 cells at the price generally charged at the time of the conclusion of the contract [*Exhibit C3, p. 17*]. Section 16.2 is thus a preliminary agreement, which determines the conditions of future individual sales contracts. Preliminary agreements are governed by the CISG, as long as they provide for sales obligations that are sufficiently definite [*BeckOGK/Wagner, Art. 1, para. 8.2; Schlechtriem/Schwenzer/Schroeter/Ferrari, Art. 1, para. 21; Staudinger/Magnus, Art. 1, para. 41;*

Schlechtriem/Schroeter, para. 63; DiMatteo et al./Torsello p. 646]. In the event that CLAIMANT pursues this option, RESPONDENT NO. 1 is bound to deliver goods, which are the produced doses of vaccine, and CLAIMANT is bound to accept them and to pay the price. Section 16.2 thus provides for a sale of goods under Art. 1(1) CISG.

b. CLAIMANT Would Not Supply a Substantial Part of the Materials

82 If CLAIMANT were to choose the option under Section. 16.2, it would not supply a substantial part in the meaning of Art. 3(1) CISG. Art. 3(1) CISG stipulates that "contracts for the supply of goods to be […] produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials […]".

83 Section 16.2 provides that RESPONDENT NO. 1 would produce the vaccine using "the purchased HEK-294 cells and cell culture medium". This refers to the materials under Section 16.1, which are to be purchased by CLAIMANT. Despite the term "purchased", RESPONDENT NO. 1's internal calculations show that these materials would not be delivered to CLAIMANT and redelivered to RESPONDENT NO. 1 [*Appendix, p. 59*]. Rather, CLAIMANT would either contribute the necessary know-how or a sample of modified vectors to enable the vaccine production. Pure know-how cannot be a substantial part of the materials under Art. 3(1) CISG because it is not considered a material in the sense of the CISG at all [*HG Kanton Zürich 10 Feb 1999; cf. OLG Frankfurt 17 Sep 1991; Magnus, p. 829; Brunner/Feit, Art. 3, para. 4; BeckOK-BGB/Saenger, Art. 3, para. 3*]. Supplying pure know-how would thus not exclude the application of the CISG.

84 The provision of the modified GorAdCam vectors would not be considered a substantial part of the materials either. "Substantial" in the meaning of the CISG is determined by the value ratio between the materials provided by each party during the production process [*HCCI 5 Dec 1995; juris-PK/Münch, Art. 3, para. 17; Ferrari et al./Saenger, Art. 3, para. 3; Brunner/Feit, Art. 3, para. 3; MüKo-HGB/Mankowski, Art. 3, para. 6; Magnus, p. 829*]. The value of the HEK-294 cells and growth medium provided by RESPONDENT NO. 1 significantly exceeds the value of the GorAdCam vectors provided by CLAIMANT. The commercialization of the vaccine would require RESPONDENT NO. 1's maximum production capacities of 20 batches per year [*PO 2, p. 53, para. 5*]. At EUR 2,000,000 per batch [*Exhibit C3, p. 17*], RESPONDENT NO. 1 would provide materials at a value of EUR 40,000,000. The modified vectors provided by CLAIMANT would only be a fraction of the initial batch, worth EUR 2,500,000 [*Exhibit C3, p. 13*]. Thus, the value of the vectors provided by CLAIMANT is significantly less than the value of RESPONDENT NO. 1's materials and so the vectors cannot be considered substantial. Consequently, the Production Option under Section 16.2 provides for a sale of goods in the sense of Art. 1(1) CISG.

C. The PCLA Is Predominantly a Sale of Goods and Thus Subject to the CISG

85 The PCLA is governed by the CISG, as it is preponderantly concerned with a sale of goods both from an economic perspective (**I**) and according to the intention of the Parties (**II**). The CISG further provides a suitable legal regime to address the issues arising from the PCLA (**III**).

I. From an Economic Perspective, the PCLA Is Preponderantly a Sale of Goods

86 The preponderant part of the PCLA is a sale of goods from an economic perspective. When applying Art. 3(2) CISG, the foremost method for quantifying preponderance is to analyse the contract in economic terms [*RB Noord-Nederland 6 Nov 2019; OLG Wien 1 Jun 2004; OLG München 3 Dec 1999; Trib Ticino 29 Oct 2003; KG Zug 25 Feb 1999; CdA Colmar 18 Feb 2015; Schlechtriem/Schlechtriem, Art. 3, para. 7a*]. For the CISG to be excluded, the non-sale of goods parts would need to exceed 50 % of the contract's value [*OLG Innsbruck 18 Dec 2007; KG Bern-Laupen 29 Jan 1999; KG Zug 25 Feb 1999; Schlechtriem/Schwenzer/Schwenzer/Hachem, Art. 3, para. 20; Kröll et al./Mistelis/Raymond, Art. 3, para. 18*]. In order to evaluate the economic ratio, the value of the sales of goods parts must be put in relation to the value of the license. *Fig. 1* shows the development of the sale of goods value (*blue*) and the license value (*orange*) during the execution of the PCLA.

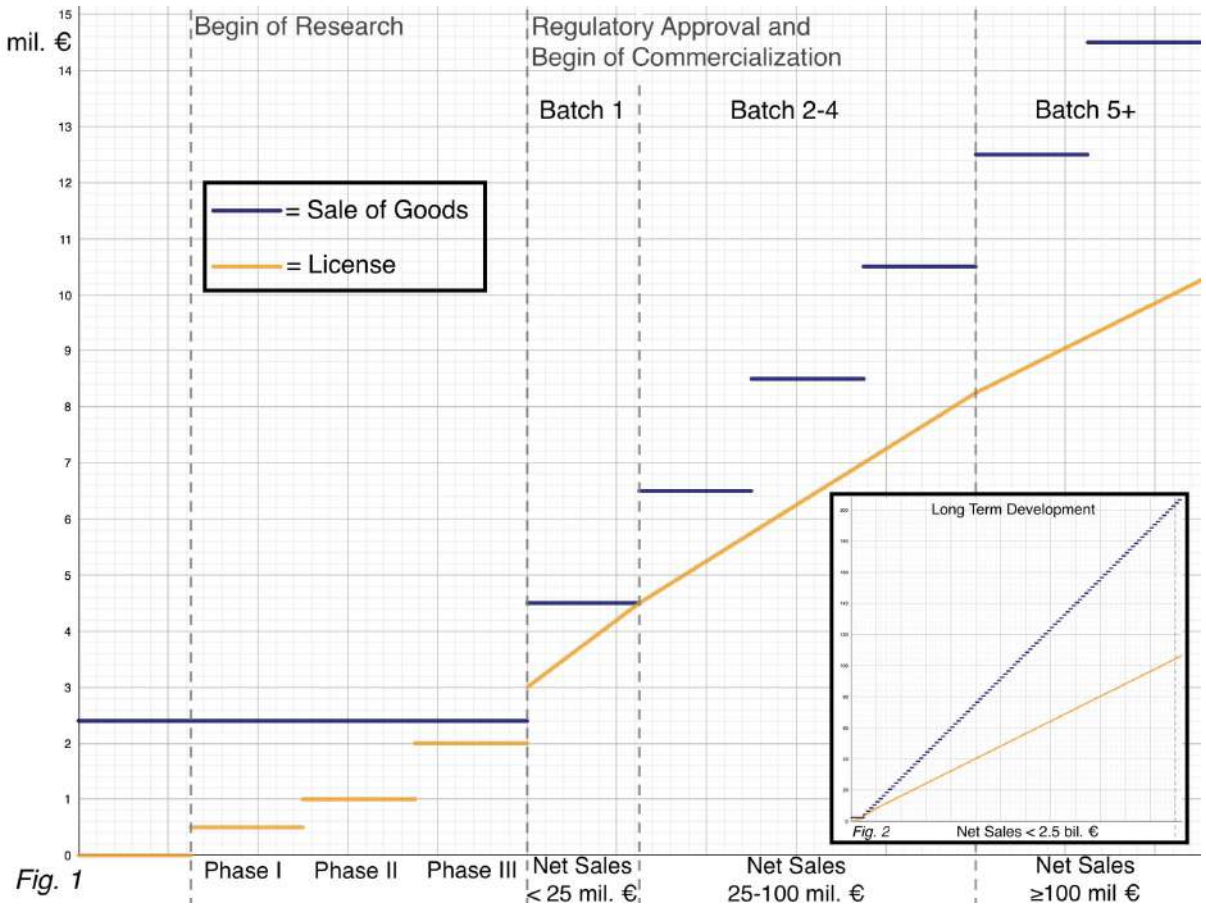


Fig. 1

88 The economic value of the sale of goods obligations is composed of an initial payment for the GorAdCam vectors and a payment for the batches of HEK-294 cells and growth medium. The license value is composed of the milestone payments and the royalties, assuming that these are paid exclusively for the license and not for the use of GorAdCam vectors. The non-sale of goods part makes up less than 50 % of the PCLA as long as the value from the sale of goods parts is equal to or higher than the value from the license.

89 Firstly, at the time of the conclusion of the PCLA, the value of the sale of goods parts was EUR 2,500,000, which is the price paid for the first batch of GorAdCam vectors [*Notice, p. 6, para. 16*]. This price is composed of production costs and profit [*Appendix, p. 59*]. The EUR 400,000, which is explicitly marked as profit [*Appendix, p. 59*], is thus not payment for the license. Rather, the license grant is remunerated through the milestone payments for reaching a clinical test phase [*cf. Notice, p. 6 et seq., para. 16*] and the royalties. The license was therefore not paid for at the time of conclusion of the contract.

90 Secondly, as the first batch of GorAdCam vectors is sufficient for research and amplification [*PO 2, p. 53, para. 4*], the value of the sale of goods remains at EUR 2,500,000 during research and the three clinical test phases. The value of the license increases with the milestone payments, reaching a total of EUR 2,000,000 upon initiation of the Phase III clinical trials [*Exhibit C3, p. 14, sec. 9.4*]. Hence, the sale of goods value continues to surpass the license value during this period of time.

91 Thirdly, upon acceptance of the vaccine by a regulatory authority, two events influence the respective values: a last milestone payment becomes due and CLAIMANT requires its first batch of growth medium to begin the commercialization of its vaccine.

92 On the one hand, the sale of goods value increases by EUR 2,000,000 with each new batch of growth medium needed, as this is the agreed-on price under Section 16.1. Calculating with a price of EUR 25 per vaccine dose [*Appendix, p. 59*], a new batch is needed every EUR 25,000,000 of net sales.

93 On the other hand, the last milestone increases the license value by EUR 1,000,000. Subsequently, royalties dependent upon the annual net sales have to be paid. These amount to 6 % of the net sales for the first batch of growth medium, 5 % for batches two to four and 4 % for every additional batch [*PO 2, p. 58, para. 43a; Exhibit C3, p. 14, sec. 9.5.1*]. The contract does not specify whether the royalties function as an additional payment for the license or for the vectors themselves. The figure above is based on the assumption that they count towards the license only. Even in that scenario, the sale of goods value vastly exceeds the license value [*cf. Fig. 1*]. These calculations do not consider the production option, which would shift the value ratio even further towards the sale of

goods parts. The Production Option would lead to the sale of goods value being doubled, whereas the license value would decrease due to the reduced royalties to be paid [*Exhibit C3, p. 17, sec. 16.3*].

94 *Fig. 1* illustrates the subordinate role of the license. Not only does the sale of goods part make up more than 50 % of the contracts' value at any given time. Considering that CLAIMANT could sell up to 100,000,000 doses annually if it were to develop a successful vaccine [*PO 2, p. 53, para. 5*], the license part would become even less relevant [*cf. Fig. 2*]. Therefore, the sale of goods part is the preponderant part of the PCLA.

II. According to the Parties Intention, the PCLA Is Mainly Focused on a Sale of Goods

95 The classification as a sale of goods contract also reflects what the Parties' main focus was when entering into the PCLA. In determining the preponderant part of a contract, the economic perspective can be supplemented by the intent of the parties [*OGH 8 Nov 2005; OLG Innsbruck 18 Dec 2007; OLG München 3 Dec 1999; OLG Dresden 11 Jun 2007; OLG Karlsruhe 12 Jun 2008; LG Mainz 26 Nov 1998; KG Zug 14 Dec 2009; cf. KG Schaffhausen 25 Feb 2002; Huber/Mullis/Huber, p. 47; cf. Schlechtriem/Schlechtriem, Art. 3, para. 7a*].

96 RESPONDENT NO. 1, on the one hand, had an increased interest in concluding a sale of goods. As a subsidiary of Roctis [*Notice, p. 4, para. 2*], RESPONDENT NO. 1 had experienced difficulties in attracting sufficient manufacturing contracts from outside the Roctis Group [*Exhibit R2, p. 31, para. 9*]. In order to ensure an economic use of its production facilities, RESPONDENT NO. 1 adopted the policy of including purchase obligations and production options in all of its contracts [*Exhibit R2, p. 31, para. 10*]. RESPONDENT NO. 1 was thus mainly interested in selling its materials to ensure an economic use of its capacities when negotiating the PCLA. CLAIMANT, on the other hand, was mainly interested in the materials produced by RESPONDENT NO. 1. This is evidenced by the fact that it had agreed to a non-exclusive license, which is in contrast with the industry practice of granting an exclusive license [*cf. Somers, Biotech*]. The Parties were far more interested in selling and being able to use the goods than in the transfer of IP-rights. Thus, they intended for a sale of goods.

97 These intentions are further displayed by the fact that the Parties changed the template used for the agreement. When drafting the PCLA, an older template was adapted to include the sales obligations of the agreement [*Exhibit R2, p. 31, para. 8*]. The Parties renamed this template, adding the purchase part to the beginning of the title [*PO 2, p. 55 et seq., para. 24*] and thereby further emphasized the preponderance of the sales obligations. The fact that they did not consistently implement this change throughout the entire contract and still refer to themselves as Licensee and Licensor does not oppose the conclusion that they intended for a sale of goods. The parties' true

intention is not changed by them using a wrong description [*cf. OLG Saarbrücken 14 Feb 2001*; *OLG München 16 Aug 2017; MüKo-BGB/Gruber, Art. 8, para. 2; BeckOGK/Bodenheimer, Art. 8, para. 7*]. In conclusion, the Parties met with the intention of concluding a sale of goods, providing CLAIMANT with the relevant materials and obliging it to pay the agreed-on purchase prices whilst ensuring an economic use of RESPONDENT NO. 1's production facilities.

III. The CISG Provides a Suitable Legal Regime to Address Issues Arising From the PCLA

98 The CISG is equipped with the rules and principles necessary to govern the Parties' obligations arising from the PCLA and to redress any breach of them. As a sales convention, the CISG contains provisions which govern the obligations of seller and buyer, transfer of risk and remedies for breach of contract [*Witz/Salger/Lorenz/Lorenz, Einleitung, para. 8; Staudinger/Magnus, Einleitung, para. 28; BeckOK-BGB/Saenger, Preamble, para. 4*]. If the PCLA were excluded from the scope of the CISG due to the license grant, the application of sales law to the PCLA would have to be excluded altogether. Consequently, many possible issues arising from the PCLA would be left to be regulated by the general provisions of Danubian contract law, which is a verbatim adoption of the UNIDROIT Principles on International Commercial Contracts [*cf. PO 1, p. 52, para. 3*]. Although the Parties established the main obligations in the PCLA, sufficient details are not provided as to the delivery and conformity of the goods, payment and acceptance, transfer of risk and breaches of contract. These issues, however, do find adequate treatment in Art. 30 – 77 CISG. The present case contains a dispute regarding a cross-border sale of goods in which a third party claims an infringement of intellectual property. While domestic law will usually not be designed for treating the issue adequately, Art. 42 CISG addresses that exact matter and provides a suitable guidance for the interests of seller and buyer. The CISG is thus a fitting legal regime for the present agreement.

CONCLUSION OF THE THIRD ISSUE

99 The CISG is applicable to the PCLA. CLAIMANT and RESPONDENT NO. 1 intended for a sale of goods under which RESPONDENT NO. 1 should provide the necessary materials in exchange for a purchase price. This intent materializes in the fact that two out of the PCLA's three main obligations, the purchase of the vectors and the obligations under Section 16, constitute sales of goods. Since these obligations represent the preponderant part of the PCLA, the CISG applies to the contract. Correspondingly, the CISG provides a suitable legal regime for the PCLA.

ISSUE 4: RESPONDENT NO. 1 BREACHED ITS OBLIGATION PURSUANT TO ART. 42 CISG BY DELIVERING GOODS THAT ARE NOT FREE FROM A THIRD-PARTY CLAIM

100 As *Honnold* said, buyers do not intend to purchase a lawsuit [*Honnold/Flechtner, Art. 42, para. 271, Art. 41, para. 266*]. CLAIMANT, however, is now faced with that exact prospect: On 1 January 2019, CLAIMANT concluded the PCLA with RESPONDENT NO. 1 for the use of GorAdCam vectors in the field of "infectious and non-infectious respiratory diseases" [*Exhibit C3, p. 12*]. Since then, CLAIMANT has been conducting research on a vaccine against COVID-19, with the early results being very promising [*Answer, p. 25, para. 3*]. Following a third-party claim raised by Ross, however, CLAIMANT is now unable to enjoy unaffected use of the vectors. Under the Ross Agreement of 15 June 2014, RESPONDENT NO. 2, the original patent owner of the GorAdCam vectors, granted Ross an exclusive license for use of the vectors in the field of "malaria and related infectious diseases" [*Exhibit R3, p. 33*]. Ross is arguing that its license extends to infectious respiratory diseases, which would conflict with CLAIMANT's use of the GorAdCam vectors for its research into a COVID-19 vaccine. CLAIMANT now faces the threat of getting embroiled in a lawsuit with Ross which represents a serious danger to its efforts in developing a COVID-19 vaccine.

101 Reflecting that buyers may expect to receive undisturbed possession and ownership of their goods [*cf. Kröll et al./Kröll, Art. 42, para. 6*], Art. 42 CISG obliges the seller to deliver the goods free from third-party claims. These claims must be based on an intellectual property right under the law of the state where the goods will be used. The seller's obligation is only excluded in cases where at the time of the conclusion the buyer knew or could not have been unaware of the claim. Under Art. 42 CISG, it is the first and main duty of a seller to deliver goods which are free from a third-party claim [*Israel Sup Ct 22 Aug* 1993].

102 Presently, the GorAdCam vectors delivered to CLAIMANT are not free from a third-party intellectual property claim (**A**). RESPONDENT NO. 1 knew about Ross's claim at the time of the conclusion of the contract (**B**). As CLAIMANT, however, did not know and did not have to know about Ross's claim at the relevant time, RESPONDENT NO. 1 is liable under Art. 42(2) CISG (**C**). Therefore, RESPONDENT NO. 1 breached its obligations pursuant to Art. 42 CISG.

A. The GorAdCam Vectors Delivered by RESPONDENT NO. 1 Are Not Free from a Third-Party Claim in the Sense of Art. 42 CISG

103 The GorAdCam vectors delivered by RESPONDENT NO. 1 are not free from a third-party claim (**I**). The claim is based on an intellectual property right under the law of the state where the goods will be used, as required by Art. 42(1)(a) CISG (**II**).

I. The GorAdCam Vectors Are Not Free from a Third-Party Claim

104 Ross asserted a claim regarding the GorAdCam vectors (**1**). Art. 42 CISG requires the goods to be free from "any right or claim". Unlike a right, a claim does not have to be justified to cause a breach of contract pursuant to Art. 42 CISG. Ross's assertion qualifies as a claim under Art. 42 CISG (**2**).

1. Ross Asserted a Claim

105 Ross has asserted a claim. Under Art. 42 CISG, a claim is asserted if it adversely affects the buyers use of the goods (**a**). The assertion by Ross affects CLAIMANT's use of the goods (**b**).

a. A Claim Is Asserted If It Adversely Affects the Buyers Use of the Goods

106 Once a claim is asserted in a way which affects the buyer in its use of the goods, it is sufficiently asserted in the sense of Art. 42 CISG. A special form of addressing the buyer is not necessary [*Schlechtriem/Schwenzer/Schroeter/Schwenzer, Art. 41, para. 11; Kröll et al./Kröll, Art. 42, para. 10*]. In particular, a third party asserting a claim is not required to have already initiated proceedings against the buyer to legally enforce its claim [*Kröll et al./Kröll, Art. 42, para. 10; MüKo-HGB/Benicke, Art. 41, para. 6, Schlechtriem/Schwenzer/Schwenzer, Art. 42, para. 6*].

107 The wording of Art. 42 CISG stipulates that the seller must deliver "goods which are free from any right or claim of a third party". Whether or not goods are free from any claim, however, is in no way dependent upon whom the claim is addressed to. The wording focuses upon the goods which are subject to the claim, rather than the person who is addressed by the claim.

108 Considering the rationale of Art. 42 CISG, the party to whom the claim was asserted must not be held as the relevant criteria either. Instead, what must be decisive is whether the assertion of the third-party claim adversely affects the buyer in its use of the goods. This follows from the aims of Art. 42 CISG, which exists to protect the buyer and ensure its undisturbed possession, ownership and use of the goods [*OGH 12 Sep 2006; cf. BGH 11 Jan 2006; Staudinger/Magnus, Art. 42, para. 13; Janal, FS-Kritzer, p. 208; Kröll et al./Kröll, Art. 42, para. 9, Art. 41, para. 16*]. The simple knowledge of a claim is enough to cause uncertainty for the buyer as to whether, by using the goods in the way it intended to, it is actually violating third-party rights. As such, the buyer cannot be expected to wait until it is directly addressed by the third party before being able to rely on Art. 42 CISG. From the buyer's perspective, it is merely up to chance whether the third party chooses to address the seller, the buyer itself or even someone else entirely.

109 In fact, the buyer's use of the goods can be fundamentally affected even when neither party to the contract has been directly addressed by the claim. For example, a third-party claim could be addressed to the authorities, who may then seize the goods in order to protect the IP-rights of the

patent holder. If this were to occur while the buyer is using the goods for reprocessing or reselling, for example while shipping the goods to a new purchaser, then neither the buyer nor the seller would be addressed directly. Nevertheless, the buyer's use of the goods would still be affected in the most fundamental way imaginable. A requirement for the buyer to be addressed directly would thus prevent Art. 42(1) CISG from being able to perform its function, the protection of the buyer.

110 Consequently, there is no requirement under Art. 42(1) CISG for the claim to address a specific party. Rather, a claim is asserted where it adversely affects the buyer's use of the goods.

b. The Assertion by Ross Affects CLAIMANT's Use of the Goods

111 Ross's assertion of its claim affects CLAIMANT's use of the goods. The use of a good would certainly be affected when a claim is fairly likely to be raised in court [*cf. Kröll et al./Kröll, Art. 42, para. 10*]. A buyer operating under this threat would be unable to use the goods as they had originally intended without incurring the risk of a third party beginning legal proceedings against them.

112 In the present case, court proceedings are fairly likely. Ross is a large company with a policy of aggressively enforcing its IP-rights [*Exhibit C5, p. 19; cf. Answer, p. 27, para. 13*]. This is evidenced by the fact that they have an entire business unit dedicated to monitoring potential infringements of their IP-rights, which is currently engaged in two litigations and one arbitration [*PO 2, p. 54, para. 15*]. Moreover, since RESPONDENT NO. 1 requested for Ross to be joined to the present proceedings [*cf. Letter Sinoussi, p. 46*], Ross will now, at the latest, be aware of CLAIMANT's position as a competitor, both in its industry and in the race to produce a COVID-19 vaccine [*PO 2, p. 54, para. 14*, *Notice, p. 7, para. 18*]. Thus, it is likely that Ross will initiate proceedings against CLAIMANT.

113 In addition, even if a claim is never raised in court, a public assertion of the claim can affect the buyer's use of the goods. This is because of the effect that a public assertion can have on how a buyer is perceived by the market [*cf. Kröll et al./Kröll, Art. 42, para. 10, Schwerha IV, p. 458*]. In the current case, Ross asserted its claim publicly in a press conference, covered in the Biopharma Science article of 19 December 2019. In this press conference, Mr. Müller, CEO of Ross, publicly stated that their exclusive license for GorAdCam vectors was obtained for malaria and "comparable infectious diseases". Crucially, Mr. Müller announced that Ross interprets this license to extend to research into vaccines against infectious respiratory diseases, including those caused by the MERS-coronavirus. The journal which published these claims, Biopharma Science, is not only a credible source of information [*PO 2, p. 54, para. 9*] but also popular with investors in the bioscience start-up market [*PO 2, p. 54, para. 8*]. Potential buyers and investors will thus read that Ross has an exclusive license to use GorAdCam vectors for research into infectious respiratory diseases, which would include COVID-19, and conclude that CLAIMANT has breached a third-party

license. Consequently, potential contractual partners and investors will likely be deterred from contracting with CLAIMANT. In particular, it will have difficulties with regard to the GorAdCam vectors, given the uncertainty which has been created surrounding CLAIMANT's right to use them.

114 Therefore, Ross has asserted its claim in a way which affects CLAIMANTS use of the goods.

2. Ross's Claim Constitutes a Claim in the Sense of Art. 42(1) CISG

115 The claim asserted by Ross meets the standards required by Art. 42(1) CISG. The claim does not need to be substantiated to constitute a breach of contract according to Art. 42(1) CISG (**a**). Even if frivolous claims were excluded under Art. 42 CISG, Ross's claim is not frivolous (**b**).

a. Any Claim Constitutes a Breach of Contract in the Sense Art. 42(1) CISG

116 Ross's claim does not need to be substantiated in order to constitute a breach of contract under Art. 42 CISG. The protection provided by Art. 42 CISG requires the delivered goods to be free from "any claim". It does not matter if the claim is justified or not [*South Korea Ct App 24 Dec 2015, Schlechtriem/Schwenzer/Schwenzer, Art. 42, para. 6, Art. 41, para. 9 et seq.; Kröll et al./Kröll, Art. 42, para. 9; BeckOGK/Hachem, Art. 42, para. 12, Art. 41, para. 13*]. This follows from the purpose of Art. 42 CISG, which is the protection of buyers from having to ward off claims that third parties could make against them [*BGer 17 Apr 2012; OGH 12 Sep 2006; BGH 11 Jan 2006; Janal, FS-Kritzer, p. 208; Huber/Mullis/Mullis, para. 8, p. 172*]. Fighting any type of claim, irrespective of whether it is substantiated or not, is costly and time consuming [*Ruda/Etier, p. 38, para. 52*]. An undisturbed use of the goods is only possible if there is no such risk [*Bacher, FS-Schwenzer, p. 119*].

117 Furthermore, it is highly difficult to objectively differentiate between a frivolous and a non-frivolous claim in practice [*MüKo-HGB/Benicke, Art. 42, para. 4; Kröll et al./Kröll, Art. 41, para. 19; Bacher, FS-Schwenzer, p. 119, VanDuzer, p. 187*]. The buyer will usually not be in a position to assess whether the claim is substantiated or not, since he has less access to the records of the goods [*Rauda/Etier, para. 53*]. Such an assessment belongs in the sphere of the seller instead [*Schlechtriem/Schwenzer/Schwenzer, Art. 42, para. 6, Art. 41, para. 10; Honnold/Flechtner, Art. 41, para. 266*]. Thus, any claim constitutes a breach of contract pursuant to Art. 42(1) CISG.

b. Even If Frivolous Claims Were Excluded under Art. 42 CISG, Ross's Claim Would Still Suffice as It Is Not Frivolous

118 Some authors propose to limit the scope of Art. 42 CISG by excluding frivolous or obviously unjustified claims of a third party [*Achilles, Art. 42, para. 3, Art. 41, para. 3; Herber/Czerwenka, Art. 41, para. 6*]. Even under this standard, Ross's claim qualifies under Art. 42 CISG.

119 This is best illustrated by the fact that RESPONDENTS have still not managed to resolve their dispute with Ross, almost two years after it arose [*Exhibit C4, p. 18*]. Both RESPONDENTS currently want to determine the scope of the Ross Agreement in front of the Tribunal [*Answer, p. 28, para. 22*]. This shows that they do not consider Ross's claim to be frivolous but in fact take it very seriously.

120 Moreover, the drafting background and wording of the Ross Agreement give Ross grounds to argue that the license they were granted by RESPONDENT NO. 2 extends to infectious respiratory diseases, including COVID-19. The Ross Agreement grants Ross an exclusive license for use of the GorAdCam vectors in the field of "malaria and related infectious diseases" [*Exhibit R3, p. 33, sec. 5.2*]. Ross has argued that they intended for the scope of their license to be as broad as possible since they paid an additional EUR 600,000 to have "related infectious diseases" added to its license [*Exhibit R2, p. 30, para. 5*]. Furthermore, it could also be argued that the negotiations leading up to the Ross Agreement support Ross's exclusive license extending to infectious respiratory diseases, such as COVID-19. During the negotiations, cholera had been cited as an example of a malaria related infectious disease [*PO 2, p. 55, para. 20*], although the diseases share no relation with regards to their molecular mechanisms, symptoms or treatments. Ross could thus try and argue that if even cholera was considered a malaria related disease then COVID-19, which shares more relation to malaria than cholera does, is also a malaria related infectious disease.

121 Malaria and COVID-19 share various commonalities, including their symptoms and treatments. The early symptoms of malaria include fever, muscle pains and fatigue, which is also the case for COVID-19 patients [*Smith, Symptoms of COVID-19*]. The commonalities then continue through the respiratory distress which both diseases cause. Up to 50 % of malaria patients are estimated to develop a dry cough [*Mazhar/Harder, p. 60*], with a comparable 67 % of COVID-19 patients said to show the same [*WHO-China, p. 12*]. Given these similarities between malaria and COVID-19, Ross may look to argue that COVID-19 should also be classified as a malaria related infectious disease and thus fall within the scope of its exclusive license.

122 Therefore, even if frivolous claims were to be excluded, Ross's assertion would qualify as a claim in the sense of Art. 42(1) CISG.

II. Ross's Claim is Based on an Intellectual Property Right Under the Law of the State Where the Goods Will Be Used Pursuant to Art. 42(1)(a) CISG.

123 Ross's claim is based on an intellectual property right under the law of the State where the goods will be used pursuant to Art. 42(1)(a) CISG. Under the CISG, intellectual property covers "all rights resulting from intellectual activity in the industrial, scientific [...] fields" [*Kröll et al./Kröll, Art. 42, para. 12; Schlechtriem/Schwenzer/Schwenzer, Art. 42, para. 4; Brunner/Tebel, Art. 42, para. 5*]. Ross's

claim concerns its IP-rights in the GorAdCam vectors. It is inherently linked to intellectual activity in the scientific field, and thus to intellectual property. The state where the goods will be used is Mediterraneo. This is the state in which CLAIMANT has its place of business and is conducting its research using the purchased vectors [E*xhibit C3, p. 11*]. Both parties were aware of this at the time the contract was concluded. The IP-laws of Mediterraneo allow for licensees to enforce their rights under an exclusive license [*PO 2, p. 58, para. 40*]. Therefore, Ross's claim is based on an intellectual property right under the law of the relevant territory according to Art. 42(1)(a) CISG.

B. RESPONDENT NO. 1 Knew About Ross's Claim at the Relevant Time

124 Mr. Doherty knew about Ross's claim and this knowledge must be attributed to RESPONDENT NO. 1. Under Art. 42(1) CISG, the seller must deliver goods which are free from any third-party intellectual property claims of which at the time of the conclusion the seller knew or could not have been unaware. While RESPONDENT NO. 1 did not positively know of the discussions concerning the scope of the Ross Agreement [*PO 2, p. 53, para. 1*], Mr. Doherty had knowledge of the claim long before the PCLA was concluded. At the latest, he gained this knowledge through an e-mail he received from Ms. Bordet on 6 December 2018 [*Exhibit R4, p. 35*]. Mr. Doherty therefore knew about the claim at the time of the conclusion of the PCLA.

125 Mr Doherty's knowledge must be attributed to RESPONDENT NO. 1 because he conducted the PCLA first as an agent for, and later as an employee of, RESPONDENT NO. 1 [*cf. Exhibit R2, p. 31, para. 8; Notice, p. 6, para. 12*]. Art. 79(1)(2) CISG and Art. 40 CISG rely on the principle that the seller is responsible for all persons it engages to fulfil his obligations [*ICC Jun 1999; Schlechtriem/Schwenzer/Schroeter/Schwenzer, Art. 40, para. 6, Art. 79, para. 9; Kröll et al./Atamer, Art. 79, para. 63*]. This amounts to a general principle in the sense of Art. 7(2) CISG which, when applied to the allocation of knowledge, means that the seller is accountable for those things which the persons it engages had knowledge of [*MüKo-BGB/Huber, Art. 79, para. 5; Schlechtriem/Schwenzer/Schroeter/Schwenzer, Art. 79, para. 9; cf. Kröll et al./Kröll, Art. 40, para. 21*].

126 While working as an agent for RESPONDENT NO. 1, Mr. Doherty conducted its contractual negotiations with CLAIMANT leading to the PCLA [*Exhibit R2, p. 31, para. 8*]. Due to his position as an agent of RESPONDENT NO. 1, Mr. Doherty's knowledge has to be attributed to RESPONDENT NO. 1. Additionally, the knowledge of employees is to be attributed to the employer [*In re Siskiyou, Bankr. D. Or. 29 Mar 2004*]. Mr. Doherty was already an employee of RESPONDENT NO. 1 when the Parties entered into the PCLA on 1 January 2019. As an employee, Mr. Doherty's knowledge of the Ross Agreement has to be attributed to RESPONDENT NO. 1.

127 In conclusion, RESPONDENT NO. 1 knew about Ross's claim at the time of the conclusion of the PCLA through Mr. Doherty.

C. RESPONDENT NO. 1's Liability is Not Excluded Pursuant to Art. 42(2)(a) CISG

128 Pursuant to Art. 42(2)(a) CISG, a seller's liability can be excluded in cases where at the time of the conclusion of the contract the buyer knew or could not have been unaware of the claim. CLAIMANT did not know about Ross's claim (**1**), nor did it have to be aware of it at the time of the conclusion of the PCLA (**2**).

1. CLAIMANT Did Not Know About Ross's Claim at the Relevant Time

129 When CLAIMANT entered into the PCLA on 1 January 2019, it was not aware of the third-party claim. Ross's research activities and the resulting intellectual property issues were only brought to the attention of CLAIMANT's COO Mr. Metschnikow in May 2020, over a year after the PCLA had been concluded [*Exhibit C5, p. 19*]. Further, Ms. Hübner, having previously worked at Ross, did not join CLAIMANT as its new CFO until after the PCLA had been concluded [*PO 2, p. 54, para. 12*] and thus her knowledge could not be contributed. CLAIMANT did not know about Ross's claim at the time of the conclusion of the PCLA.

2. CLAIMANT Did Not Have to be Aware of Ross's Claim at the Relevant Time

130 CLAIMANT did not have to be aware of Ross's claim. Art. 42(2)(a) CISG does not impose upon the buyer a duty to investigate the existence of third-party claims [*OGH 12 Sep 2006; Kröll et al./Kröll, Art. 42, para. 38; MüKo-BGB/Gruber, Art. 42, para. 22; Schlechtriem/Schwenzer/Schroeter/Schwenzer, Art. 42, para. 15*]. As such, CLAIMANT had no duty to read the first Biopharma Science article, released on 14 December 2018. This was the only article mentioning Ross and RESPONDENT NO. 2's dispute which had been released before the conclusion of the PCLA. While the journal might be popular with investors in the bioscience start-up market, CLAIMANT was not subscribed when the article was published [*PO 2, p. 54, para. 8*]. The fact that it previously subscribed to Biopharma Science is irrelevant. Otherwise, one would effectively assume that there is an obligation to subscribe to and read all journals related to the field of life sciences.

131 Moreover, even if CLAIMANT had read the prior Biopharma Science article of 14 December 2018, it would not have known about Ross's claim regarding the GorAdCam vectors. In the article, the dispute between RESPONDENT NO. 2 and Ross was only vaguely described and no further details as to a claim were provided [*PO2, p. 54, para. 8*].

132 Furthermore, CLAIMANT had no reason to track the development of the contractual relations between RESPONDENT NO. 2 and Ross, neither of whom was party to the PCLA, several years prior to contracting with RESPONDENT NO. 1. Therefore, CLAIMANT did not have to be aware of the press release of June 2014 either, in which RESPONDENT NO. 2 stated that Ross had acquired an exclusive license for malaria and infectious diseases [*Exhibit C1, p. 9*]. In addition, the Ross Agreement predates the acquisition of RESPONDENT NO. 2 by Roctis and was therefore established at a time when the RESPONDENTS were not linked in any way. CLAIMANT had no duty to investigate the contractual history of two foreign and, at that time, unrelated parties.

133 Thus, CLAIMANT did not know about Ross's claim at the time of the conclusion of the PCLA, nor did it have to be aware of it.

CONCLUSION OF THE FOURTH ISSUE

134 RESPONDENT NO. 1 breached its obligation according to Art. 42 CISG as the goods it delivered are not free from a third-party claim. Ross has asserted that CLAIMANT's use of GorAdCam vectors for research into COVID-19 is in breach of its own exclusive license. Consequently, there is a third-party claim on the vectors sold by RESPONDENT NO. 1 to CLAIMANT. RESPONDENT NO. 1 knew about this claim when the PCLA was concluded. Furthermore, its liability is not excluded by Art. 42(2)(a) CISG since CLAIMANT was not and did not have to be aware of Ross's right. In conclusion, RESPONDENT NO. 1 breached its contractual obligations pursuant to Art. 42(1) CISG.

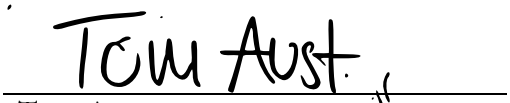
REQUEST FOR RELIEF

In response to the Tribunal's Procedural Orders, Counsel makes the above submissions on behalf of CLAIMANT. For the reasons stated in this Memorandum, Counsel respectfully requests this Tribunal to declare that:

- Ross should not be joined to the Arbitration Proceedings (**Issue 1**).
- The examination of witnesses and experts in the 2nd Hearing of 3 to 7 May 2021 should be conducted remotely if a hearing in person is not possible or considered by the Arbitral Tribunal to be inappropriate (**Issue 2**).
- The CISG is applicable to the "Purchase, Collaboration and License Agreement" concluded between CLAIMANT and RESPONDENT NO. 1 (**Issue 3**).
- RESPONDENT NO. 1 has breached its contractual obligations to deliver conforming goods existing pursuant to Article 42 CISG by providing CLAIMANT with the batches of GorAdCam viruses (**Issue 4**).

CERTIFICATE

We hereby confirm that this Memorandum was written only by the persons whose names are listed below and who signed this certificate. We also confirm that we did not receive any assistance during the writing process from any person that is not a member of this team.Our university is competing in both the Vis East Moot and theVienna Vis Moot. We are submitting two separately prepared, different Memoranda.



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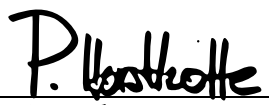
Theresia de la Cruz Rothenfusser



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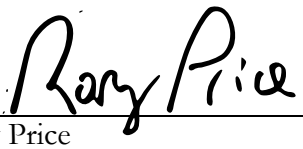

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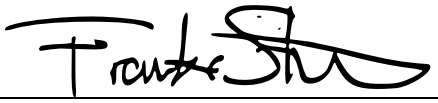
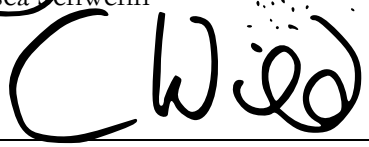


Franka Stück



Christian Wild

EIGHTEENTH ANNUAL WILLEM C. VIS EAST INTERNATIONAL COMMERCIAL ARBITRATION MOOT & 2ND VVE

Certificate and Choice of Forum

To be attached to each Memorandum

I David Willfort, on behalf of the Team for (name of School)

Albert Ludwig University of Freiburg hereby certify that the attached memorandum was prepared by the members of the student team, and that no person other than a student team member has participated in the writing of this Memorandum.

Check off the boxes as appropriate:

☐ Our School will be participating only in the Vis East Moot and is not competing in the Vienna Vis Moot.

☒ Our School is competing in both Vis East Moot and Vienna Vis Moot.

☒ We are submitting two separately prepared, different Memoranda to Vis East Moot and to Vienna Vis Moot.

Or

☐ We are submitting the same Memorandum to both Vis East Moot and Vienna Vis Moot, and we choose to be considered for an Award in (check one box)

☐ Vis East Moot in Hong Kong, or

☐ Vienna Vis Moot

Authorised Representative of the Team for (School name) Albert Ludwig University of Freiburg

Name David Willfort

Signature D. Willfort